

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Saguaro Connector Pipeline, L.L.C. )

Docket No. CP23-29-000

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF  
SAGUARO CONNECTOR PIPELINE, L.L.C.**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. §§ 385.212 and 385.213, Saguaro Connector Pipeline, L.L.C. (“Saguaro”) hereby moves for leave to answer the protests filed by the national advocacy groups, Sierra Club and Public Citizen, Inc. (“Public Citizen”) (collectively, “Protests”)<sup>1</sup> to Saguaro’s Application for Authorization under section 3 of the Natural Gas Act (“NGA”) and a Presidential Permit (“Application”).<sup>2</sup> In the Application, Saguaro requests authorization to site, construct, connect, operate, and maintain certain natural gas pipeline facilities extending approximately 1,000 feet at the international border under the Rio Grande River to allow

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<sup>1</sup> Saguaro respectfully requests leave to answer the Protests filed by the Sierra Club and Public Citizen. *See Saguaro Connector Pipeline, LLC*, Protest of Sierra Club, Docket No. CP23-29-000 (Jan. 26, 2023) (“Sierra Club Protest”); *Saguaro Connector Pipeline, LLC*, Protest of Public Citizen, Inc., Docket No. CP23-29-000 (Jan. 26, 2023) (“Public Citizen Protest”). The Commission permits answers to protests that provide information that assists the Commission in the decision-making process. *See, e.g., Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at P 9 (2016). The Commission “generally finds that answers to protests provide valuable information relevant to its decisionmaking process.” *Guardian Pipeline, L.L.C.*, 91 FERC ¶ 61,285, at 61,961 (2000). This answer provides additional information that will assist the Commission in the decision-making process and ensure that the record is accurate and complete. Accordingly, good cause exists to accept this answer.

<sup>2</sup> *Saguaro Connector Pipeline, L.L.C.*, Application for Natural Gas Act section 3 Authorization and Presidential Permit to Construct Natural Gas Pipeline Facilities at the United States of America – Mexico Border, Docket No. CP23-29-000 (Dec. 20, 2022).

for the export of natural gas at a point on the International Boundary between the United States, in the vicinity of Sierra Blanca in Hudspeth County, Texas, and Mexico (“Border Facilities” or “Project”).

## **I. INTRODUCTION**

As explained below, the Commission should dismiss the Protests and approve Saguaro’s Application, consistent with the Commission’s practice and precedent. Nothing presented in the Protests supports a contrary result. The Protests only raise issues previously decided by the Congress, the Courts, and the Commission regarding the scope of the Commission’s jurisdiction over upstream intrastate pipeline facilities (“the Intrastate Facilities”<sup>3</sup>), the scope of the environmental review of the Project, and whether the Project is consistent with the public interest.

Sierra Club asserts that: (1) the Commission’s NGA jurisdiction extends beyond the Border Facilities to the Intrastate Facilities that Saguaro will construct to connect with the Border Facilities; and (2) the Commission’s National Environmental Policy Act (“NEPA”) review should include both the Border Facilities and the Intrastate Facilities. However, no portion of the Intrastate Facilities is subject to the Commission’s siting jurisdiction under section 7 of the NGA, and Saguaro will not be a “natural gas company” under federal law. Accordingly, the Commission’s jurisdiction is limited to the Border Facilities and does not extend to the Intrastate Facilities, and thus the Commission is not required to review the Intrastate Facilities as part of its federal action under NEPA.

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<sup>3</sup> The Intrastate Facilities will be located wholly within the State of Texas and will be subject to the jurisdiction of the Railroad Commission of Texas (“RRC”). The Intrastate Facilities will extend approximately 155 miles from an interconnect with ONEOK WesTex Transmission, L.L.C. (“WesTex”) at the Waha Hub in Pecos County, Texas, cross Reeves, Jeff Davis, and Culberson Counties, Texas, and terminate at the Border Facilities in Hudspeth County, Texas.

Public Citizen contends that the Border Facilities are not in the public interest because a portion of the natural gas is “designed to be liquefied at facilities on Mexico’s pacific coast for export out of Mexico.”<sup>4</sup> However, as discussed further below, responsibility for determining whether export to Mexico or other countries is in the public interest (as distinct from whether siting or construction of facilities is in the public interest) lies with the Department of Energy, not the Commission. Regardless, because the Border Facilities will be used to export natural gas to Mexico, the siting of the facility is subject to the Commission’s jurisdiction under section 3 of the NGA, which contains a presumption of public interest when the export is to a free trade agreement nation.<sup>5</sup> Thus, given that United States and Mexico are signatories to the United States-Mexico-Canada Agreement,<sup>6</sup> the Commission should find that the Project meets the requirements of NGA section 3 and is consistent with the public interest.

## **II. BACKGROUND**

In this proceeding, Saguaro proposes to site, construct, connect, operate, and maintain the Border Facilities, consisting of approximately 1,000 feet of 48-inch-diameter pipeline from the international boundary at the center of the Rio Grande River to a point along the pipeline approximately 1,000 feet inland from the river. The Border Facilities will be located approximately 18 miles southwest of the nearest municipality, Sierra Blanca, in Hudspeth County, Texas. At the International Boundary at the center of the Rio Grande River, Saguaro will connect with NewCo Mexico Pipeline, which will extend to a

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<sup>4</sup> Public Citizen Protest at 2.

<sup>5</sup> 15 U.S.C. § 717b(c).

<sup>6</sup> *See United States-Mexico-Canada Agreement*, Office of the United States Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Feb. 21, 2023).

liquefied natural gas (“LNG”) export facility under development on the West Coast of Mexico. The Border Facilities will also connect with the Intrastate Facilities, which Saguaro will construct under the jurisdiction of the RRC. Because the Border Facilities are located at the International Boundary and will export and/or import gas between the United States and Mexico, Saguaro is required to obtain NGA section 3 authorization from the Commission and a Presidential Permit pursuant to Executive Order No. 10,485,<sup>7</sup> as amended by Executive Order No. 12,038,<sup>8</sup> for the Border Facilities.

On the Border Facilities, Saguaro will provide transportation in foreign commerce pursuant to section 3 of the NGA, and on the Intrastate Facilities, Saguaro will provide transportation in intrastate commerce as an intrastate pipeline as defined in the Texas Utilities Code<sup>9</sup> and section 2(16) of the Natural Gas Policy Act of 1978 (“NGPA”).<sup>10</sup> While Saguaro is not responsible for sourcing the natural gas for export through the Border Facilities,<sup>11</sup> initial service on the system will be limited to natural gas that has been produced and transported entirely within the State of Texas, and the system will not be interconnected with or receive gas from any interstate pipeline until after Saguaro has established its intrastate service and made any necessary filings to authorize transportation

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<sup>7</sup> Exec. Order No. 10,485, 3 CFR (1949-1953).

<sup>8</sup> Exec. Order No. 12,038, 3 CFR (1978).

<sup>9</sup> Tex. Util. Code §§ 101.003(7), 121.001(a).

<sup>10</sup> 15 U.S.C. § 3301(16) (“The term ‘intrastate pipeline’ means any person engaged in natural gas transportation (not including gathering) which is not subject to the jurisdiction of the Commission under the Natural Gas Act (other than any such pipeline which is not subject to the jurisdiction of the Commission solely by reason of section 1(c) of the Natural Gas Act.”).

<sup>11</sup> Saguaro does not intend to either purchase or resell, or import or export, natural gas for its own account, but proposes only to provide transportation service through its proposed facilities. Saguaro’s shippers will be solely responsible for obtaining any necessary authorization to import or export natural gas over the facilities.

of gas from an interstate pipeline. Service on, and the siting of, the Intrastate Facilities are therefore solely subject to the RRC's jurisdiction.

### III. ANSWER

#### A. **Saguaro Will Operate in Foreign Commerce and Intrastate Commerce, Not Interstate Commerce, and Therefore, the Intrastate Facilities and Border Facilities Are Not Within the Commission's NGA Section 7 Jurisdiction.**

The Sierra Club asserts that the entire Saguaro pipeline should be subject to NGA section 7 jurisdiction because it “is *likely* to transport interstate gas when it initiates service” because it will deliver supplies from the Waha Hub.<sup>12</sup> But, likelihood is not the test; a pipeline must intend to transport gas in interstate commerce from the outset to qualify for the Commission's NGA section 7 jurisdiction at the construction stage.<sup>13</sup> The Intrastate Facilities do not qualify as jurisdictional under this test.

The Intrastate Facilities will be an “intrastate pipeline” as it will be “engaged in natural gas transportation . . . not subject to the jurisdiction of the Commission under the Natural Gas Act.”<sup>14</sup> This is consistent with prior Commission determinations that a company that has not yet begun operations qualifies as an “intrastate pipeline” as defined by the NGPA when it “clearly intends to use its existing facilities for intrastate transportation upon completion of all necessary facilities construction.”<sup>15</sup> Thus, given that

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<sup>12</sup> Sierra Club Protest at 5-6 (emphasis added).

<sup>13</sup> See *Egan Hub Partners, L.P.*, 73 FERC ¶ 61,334, at 61,927, 61,930 (1995); *Louisiana Gas System Inc. v. Panhandle Eastern Corp.*, 73 FERC ¶ 61,161 (1995); *KansOk P'ship*, 73 FERC ¶ 61,160, at 61,482 (1995).

<sup>14</sup> 15 U.S.C. § 3301(16).

<sup>15</sup> See *Lee 8 Storage P'ship*, 73 FERC ¶ 61,159, at 61,478 (1995) (“Section 2(16) of the NGPA defines ‘intrastate pipeline’ as any person engaged in natural gas transportation (not including gathering) which is not subject to the jurisdiction of the Commission under the NGA.”).

the Saguaro pipeline (i.e., both the Intrastate Facilities and Border Facilities) will connect to an existing intrastate natural gas pipeline (i.e., WesTex), will be located wholly in Texas, and initially will transport gas produced within the state of Texas, it is an intrastate pipeline.

In any event, Sierra Club presents no evidence to support its assertion that simply being located in the Waha Hub inherently means that Saguaro will transport natural gas that has been interstate commerce. Rather, Sierra Club infers that Saguaro will transport gas in interstate commerce because the Intrastate Facilities connect to the Waha Hub in Pecos County, Texas, where “more than a dozen [intrastate and interstate] pipelines interconnect . . . and transport gas to intrastate, interstate, Mexican, and global markets.”<sup>16</sup> But simply because a pipeline transports gas from the Waha Hub does not mean that it transports gas in interstate commerce.<sup>17</sup> As described in the Application and above, the Intrastate Facilities will interconnect with the Border Facilities and will tie into the existing WesTex *intrastate* natural gas pipeline at the Waha Hub.<sup>18</sup>

Sierra Club further argues that, because Saguaro “*may* transport interstate gas [pursuant to NGPA section 311<sup>19</sup>] in the future,” the Commission must assess the Intrastate Facilities under section 7 now, otherwise Saguaro would inappropriately “evade” the Commission’s NGA section 7 jurisdiction.<sup>20</sup> In support, Sierra Club relies on *Egan Hub*

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<sup>16</sup> *Double E Pipeline, LLC*, 173 FERC ¶ 61,074, at P 99 (2020) (footnote omitted).

<sup>17</sup> *See Owen Stanly Parker v. Permian Highway Pipeline LLC*, 180 FERC ¶ 61,179 (2022) (rejecting challenge to intrastate pipeline status of pipeline that extends from Reeves County Texas, i.e., the Waha Hub, to the Texas Gulf Coast).

<sup>18</sup> Application at 5.

<sup>19</sup> 15 U.S.C. § 3371.

<sup>20</sup> Sierra Club Protest at 8.

*Partners*,<sup>21</sup> *Louisiana Gas System*,<sup>22</sup> and *KansOk*.<sup>23</sup> But, the Commission has already distinguished each of these cases from circumstances similar to those present here.<sup>24</sup> Unlike those cases, Saguaro is not combining non-jurisdictional pipelines to transport gas in interstate commerce in circumvention of the Commission's NGA section 7 jurisdiction; rather, Saguaro is constructing intrastate and border facilities to move gas in intrastate and foreign commerce. Thus, as in similar NGA section 3 proceedings,<sup>25</sup> the Commission should find no NGA section 7 jurisdiction here.

Further, that Saguaro may, in the future, seeks authorization to transport gas in interstate commerce pursuant to NGPA section 311 does not provide grounds for the Commission to assert NGA section 7 jurisdiction. In fact, the Commission previously has determined that possible future changes to a pipeline's configuration or operation that may

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<sup>21</sup> See *Egan Hub Partners, L.P.*, 73 FERC ¶ 61,334, at 61,927, 61,930 (1995) (“*Egan Hub Partners*”).

<sup>22</sup> *Louisiana Gas System Inc. v. Panhandle Eastern Corp.*, 73 FERC ¶ 61,161 (1995).

<sup>23</sup> See *KansOk P'ship*, 73 FERC ¶ 61,160, at 61,482 (1995).

<sup>24</sup> See *Valley Crossing Pipeline, LLC*, 161 FERC ¶ 61,084, at P 24 (2017).

<sup>25</sup> See, e.g., *Valley Crossing Pipeline*, 161 FERC ¶ 61,084, at P 21 (if the intrastate pipeline later files for authorization to transport natural gas under NGPA section 311, “the Commission's jurisdiction will extend only to the service; such transportation service will not subject Valley Crossing's pipeline facilities to the Commission's jurisdiction, under either section 311 of the NGPA or under section 7 of the NGA”); *Comanche Trail Pipeline, LLC*, 155 FERC ¶ 61,182, at PP 3, 5 (2016) (“*Comanche Trail*”) (issuing a Section 3 authorization and a Presidential Permit to applicant, which “currently does not own any pipeline facilities or engage in any natural gas transportation services” and recognizing that applicant “may at a later time provide interstate transportation services under section 311” of the NGPA); *NET Mex. Pipeline Partners, LLC*, 145 FERC ¶ 61,112, at PP 3, 7 (2013) (recognizing that applicant was formed “to construct, own, and operate an intrastate pipeline in the state of Texas” and intends “at a later time to provide interruptible transportation services under section 311” of the NGPA).

allow for future transportation of natural gas in interstate commerce do not support assertion of NGA section 7 jurisdiction over an otherwise NGA-exempt project.<sup>26</sup>

Moreover, while the Intrastate Facilities will operate only in intrastate commerce, the Border Facilities will operate only in foreign commerce. The NGA treats foreign commerce as separate and distinct from interstate commerce.<sup>27</sup> For this reason, it is well settled that operating in foreign commerce, but not interstate commerce, does not subject a company to the Commission's jurisdiction under section 7 of the NGA.<sup>28</sup> Courts have found that the export or import of natural gas between the United States and a foreign country was specifically excluded from the definition of "interstate commerce."<sup>29</sup> Similarly, the Commission has recognized that "[i]nterstate commerce and foreign commerce are distinct terms and one is not inclusive of the other."<sup>30</sup>

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<sup>26</sup> See e.g., *Valley Crossing Pipeline*, 161 FERC ¶ 61,084, at P 21 ("we will not seek to exercise jurisdiction based on an expectation of future changes to a project's operation") (footnote omitted); *Ga. Strait Crossing Pipeline LP*, 100 FERC ¶ 61,280, at P 31 (2002) (stating that it "would be inappropriate to claim jurisdiction over [facilities] based exclusively on the expectation that lateral lines eventually will be built").

<sup>27</sup> Section 1(b) of the NGA provides, among other things, that the NGA "shall apply to the transportation of natural gas in interstate commerce . . . and to the importation or exportation of natural gas in foreign commerce." 15 U.S.C. § 717. See generally NGA section 3 for foreign commerce and section 7 for interstate commerce.

<sup>28</sup> See *Border Pipe Line Co. v. FPC*, 171 F.2d 149, 150-51 (D.C. Cir. 1948) ("*Border Pipe Line*") (explaining that "[i]nterstate commerce and foreign commerce have been distinct ideas ever since they appeared as two concepts in the Constitution" and "'interstate commerce' does not include foreign commerce, unless Congress by definition for the purposes of a particular statute includes them both in the single expression."); see also *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1062 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 834 (1974).

<sup>29</sup> See *Border Pipe Line*, 171 F.2d at 151-52.

<sup>30</sup> See e.g., *Comanche Trail*, 155 FERC ¶ 61,182, at P 18; see also *Sound Energy Sols.*, 107 FERC ¶ 61,263, at P 15 (2004) (construing the NGA definition of "interstate commerce" to exclude transportation of natural gas between one state



In sum, the Border Facilities and the Intrastate Facilities are outside the Commission's jurisdiction under NGA section 7.

**B. The Intrastate Facilities Are Not Export Facilities Within the Commission's NGA Section 3 Jurisdiction.**

The Sierra Club lobbies to reverse established Commission precedent by preferring that the Intrastate Facilities and the Border Facilities be considered "a single export project" subject to the Commission's NGA section 3 jurisdiction.<sup>31</sup> However, only the facilities actually sited at the border fall within the Commission's NGA section 3 authority. The Commission should reject Sierra Club's lobbying as inconsistent with the NGA, the Secretary of Energy's delegation of authority to the Commission, and court precedent.

The Commission has long held that "when companies construct a pipeline to transport import or export volumes, only a small segment of the pipeline close to the border is deemed to be the import or export facility for which section 3 authorization is

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and a foreign country); *Yukon Pac. Corp.*, 39 FERC ¶ 61,216, at 61,758 (1987) (same).

<sup>31</sup> Sierra Club Protest at 3.

necessary.”<sup>32</sup> Whether any interconnecting or upstream pipeline requires the Commission’s authorization under NGA section 7 is a separate question.<sup>33</sup>

In *Western Gas Interstate Co.*,<sup>34</sup> the Commission examined whether a pipeline, located wholly within Texas and receiving gas in interstate commerce from El Paso Natural Gas, should be placed under NGA section 3 jurisdiction on the grounds that the entire system in is foreign commerce, not interstate commerce. There, the Commission made clear that the “Commission’s section 3 jurisdiction is limited to the point of import/exportation,” and “[i]f the gas is being transported in both interstate and foreign commerce, the Commission has section 3 jurisdiction over the point of export/importation and section 7 jurisdiction over the facilities up to or from the point of export/importation.”<sup>35</sup> Thus, the Commission exercised NGA section 3 jurisdiction over the border facilities and

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<sup>32</sup> See *Trans-Pecos Pipeline*, 155 FERC ¶ 61,140, at P 31; see also *id.* (“while the applicant’s overall project will include approximately 148 miles of pipeline, the only portion subject to the Commission’s jurisdiction is the 1,093 feet that would constitute the import/export border-crossing facilities for which authorization under section 3 of the NGA and a Presidential Permit are necessary. The remaining 148 miles of upstream pipeline facilities sited in Texas are under the jurisdiction of the Railroad Commission of Texas.”); *Comanche Trail*, 155 FERC ¶ 61,182, at PP 26-51 (granting NGA section 3 authorization and Presidential Permit for 1,086-foot export facility); *Roadrunner Gas Transmission, LLC*, 153 FERC ¶ 61,041, at P 4 (2015) (same for approximately 900-foot export facility); *Houston Pipe Line Co.*, 146 FERC ¶ 61,195 (2014) (same for approximately 900-foot export facility); *NET Mexico Pipeline Partners, LLC*, 145 FERC ¶ 61,112 (2013) (same for approximately 1,400-foot export facility); *Oasis Pipeline, L.P.*, 127 FERC ¶ 61,263 (2009) (same for 836-foot export facility); *Coral Mex. Pipeline, LLC*, 89 FERC ¶ 61,171 (1999); *Valero Transmission, L.P.*, 57 FERC ¶ 61,299 (1991) (same for approximately 1,000-foot export facility).

<sup>33</sup> See *Trans-Pecos Pipeline*, 155 FERC ¶ 61,140, at P 31.

<sup>34</sup> *Western Gas Interstate Co.*, 59 FERC ¶ 61,022 (1992).

<sup>35</sup> *Id.* at 61,048-49. See *Southern LNG, Inc.*, 131 FERC ¶ 61,155, at P 15 n.17 (2010) (stating that “only a small segment of the pipeline close to the border is deemed to be the import or export facility for which section 3 authorization is necessary”).

NGA section 7 jurisdiction over the facilities delivering gas in interstate commerce from El Paso Natural Gas's system to the border facilities. In other words, the Commission's NGA section 3 jurisdiction cannot be extended beyond those facilities at the point of export/import.

The Commission's interpretation is consistent with the scope of authority delegated by the Secretary of Energy. The Commission's authority under NGA section 3 is restricted to that delegated by the Secretary of Energy.<sup>36</sup> Pursuant to a 2006 delegation order, the Commission has been granted only limited delegated authority to approve the construction, operation and siting "of particular facilities," and with respect to natural gas that involves the construction of new domestic facilities, "the place of entry for imports or exit for exports."<sup>37</sup> The Commission has no other authority that would expand its NGA section 3 authority here beyond the Border Facilities.

The Commission's interpretation is also supported by court precedent. In *Border Pipe Line*, the court held that although a segment of pipeline operating in foreign commerce at the international border fell under NGA section 3 jurisdiction, the project did not fall under section 7 jurisdiction because the pipeline facilities that connected to the border-

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<sup>36</sup> The 1977 Department of Energy Organization Act assigned the Secretary of Energy exclusive authority over the regulation of exports and imports of natural gas except to the extent delegated by the Secretary to the Commission. *See* Department of Energy Organization Act, Pub. Law. 95-91, section 402(f), 91 Stat. 565 ("No function described in this section which regulates the exports or imports of natural gas or electricity shall be within the jurisdiction of the Commission unless the Secretary assigns such a function to the Commission.").

<sup>37</sup> Secretary of Energy Delegation Order No. S1-DEL-FERC-2006, section 1.21(A) (2006) (Delegating the Commission authority to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports").

crossing segment were located in Texas, transported Texas gas, and therefore were not operating in interstate commerce.<sup>38</sup>

The rule of decision from *Border Pipe Line* applies here. Although the Commission has section 3 jurisdiction over Saguaro's Border Facilities at the site of exportation at the border, the Commission has no basis to assert jurisdiction over the Intrastate Facilities. The Intrastate Facilities will be located entirely in Texas, and when it begins service all of the gas it transports will be produced in Texas and only transported in intrastate commerce. Thus, Saguaro's application correctly requests authorization under section 3 of the NGA and a Presidential Permit for the Border Facilities.

**C. The Commission's NEPA Review Only Extends to the Border Facilities and not the Intrastate Facilities**

The Sierra Club contends that the Commission's NEPA review for the Project must include the Intrastate Facilities, "regardless of the extent of [the Commission's] jurisdiction over the Project under the NGA[.]"<sup>39</sup> But, NEPA and Commission precedent require only that the Commission evaluate the environmental effects of the Border Facilities, and not the Intrastate Facilities. NEPA requires a federal agency to evaluate the relevant environmental effects of the proposed federal project or action that is before the agency for approval.<sup>40</sup> The Commission's NEPA review will include only related non-jurisdictional facilities where "there is sufficient federal control and responsibility" over the Border

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<sup>38</sup> See *Border Pipe Line*, 171 F.2d 149 at 150-52.

<sup>39</sup> Sierra Club Protest at 9-10.

<sup>40</sup> 42 U.S.C. § 4332(2)(C).

Facilities and Intrastate Facilities, as a whole, to warrant environmental analysis of the non-jurisdictional portion.<sup>41</sup>

The Commission applies the following four-factor test to determine whether there is sufficient federal control and responsibility: (i) whether the regulated activity comprises “merely a link” in a corridor-type project; (ii) whether aspects of the non-jurisdictional facility in the immediate vicinity of the regulated activity affect the location and configuration of the regulated activity; (iii) the extent to which the entire project would be within the Commission’s jurisdiction; and (iv) the extent of cumulative federal control and responsibility.<sup>42</sup> Importantly, the Sierra Club Protest did not mention, or otherwise seek to apply, the Commission’s test. As detailed in the Application (specifically, Resource Report 1, section 1.10.1), under the four-factor test, there is insufficient federal control and responsibility over the entirety of the Saguaro pipeline to support inclusion of the Intrastate Facilities in the Commission’s NEPA review of the Border Facilities.<sup>43</sup>

With regards to the first factor, the Border Facilities are merely a small link, just 1,000 feet of pipeline, between two larger non-jurisdictional corridor-type projects: the 155-mile Intrastate Facilities and the downstream facilities in Mexico.<sup>44</sup> The Commission has consistently determined under such circumstances that analysis of an intrastate project

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<sup>41</sup> *Algonquin Gas Transmission Co.*, 59 FERC ¶ 61,255, at 61,934 (1992).

<sup>42</sup> *See* 18 C.F.R. § 380.12(c)(2)(ii); *see also Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at PP 32-35 (applying the four-factor test to an intrastate pipeline upstream of border-crossing facilities); *Algonquin Gas Transmission Co.*, 59 FERC at 61,934.

<sup>43</sup> Saguaro recognizes that the Intrastate Facilities will be evaluated as part of the “cumulative impacts” associated with the Border Facilities. *See* Application, Resource Report 10.

<sup>44</sup> Application, Resource Report 1.10.1.

with border-crossing facilities under the first factor indicates that federal control and responsibility is insufficient to warrant an environmental analysis of the non-jurisdictional facilities.<sup>45</sup>

Second, the location of the non-jurisdictional Intrastate Facilities had no effect on the location and configuration of the Border Facilities.<sup>46</sup> Rather, the location of the Border Facilities was dictated by the interconnect location inside Mexico, which assessed and aligned the International Boundary point for the interconnect.<sup>47</sup> The Commission has determined that under such circumstances, analysis under the second factor indicates that federal control and responsibility is insufficient to warrant an environmental analysis of the non-jurisdictional facilities.<sup>48</sup>

Third, only the 1,000-foot Border Facilities will be within the Commission's NGA jurisdiction. In contrast, a vast majority of the Saguaro system, i.e. the 155-mile Intrastate Facilities, is non-jurisdictional.<sup>49</sup> Under such circumstances, the Commission has

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<sup>45</sup> See *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at P 33 (“[T]he import/export facilities are merely a link between two non-jurisdictional facilities: Trans-Pecos's 148-mile upstream pipeline and the downstream Mexican facilities.”); see also *San Diego Gas & Elec. Co.*, 64 FERC ¶ 61,221, at 62,652 (1993) (“*San Diego Gas*”) (same); *Gas Co. of N.M.*, 64 FERC ¶ 61,226, at 62,669 (1993) (“*Gas Co. of N.M.*”) (same)

<sup>46</sup> Application, Resource Report 1.10.1.

<sup>47</sup> See Application, Resource Report sections 1.10.1.2 and 10.3.

<sup>48</sup> See *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at P 33 (“[W]hile the proposed import/export facilities will indeed connect to the 148-mile intrastate pipeline, the routing of the upstream pipeline had little impact on the overall location and configuration of the proposed import/export facilities. Rather, the proposed import/export facilities’ design and location were determined based on the downstream Mexican interconnect location.”); see also *San Diego Gas*, 64 FERC at 62,652 (stating that “[a]lthough the [project] is designed to provide the necessary capacity, there is nothing about its design that is uniquely influenced by the location of the nonjurisdictional facilities”); *Gas Co. of N.M.*, 64 FERC at 62,669 (same).

<sup>49</sup> Application, Resource Report 1.10.1.

determined that federal control and responsibility is insufficient to warrant an environmental analysis of the non-jurisdictional facilities.<sup>50</sup>

Finally, the extent of cumulative federal control and responsibility for the entire Saguaro system is limited. The Intrastate Facilities are subject to the jurisdiction of the RCC, a state agency, which has already issued two permits to operate.<sup>51</sup> Saguaro will construct the Intrastate Facilities with no federal financial involvement.<sup>52</sup> Although there may be some limited federal involvement due to permitting required from the United States Army Corps of Engineers, the Commission has concluded in the past that this level of involvement constitutes “minimal cumulative federal control . . . not large enough to warrant ‘federalizing’ the much larger non-jurisdictional portion of the project” for NEPA purposes.<sup>53</sup>

Given that “none of the four factors is sufficient to cause the construction of the nonjurisdictional facilities to become federal actions requiring environmental analysis

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<sup>50</sup> See *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at P 33 (“The Commission’s jurisdiction over Trans-Pecos’s proposed import/export facilities is not sufficient to “federalize” the much larger non-jurisdictional facilities.”); see also *Comanche Trail*, 155 FERC ¶ 61,182, at P 50 (same); see also *San Diego Gas*, 64 FERC at 62,652 (finding that the bulk of the entire 80-mile project is nonjurisdictional with only 2.1 miles of jurisdictional facilities and therefore not sufficient to extend the environmental analysis to the nonjurisdictional assets); *Gas Co. of N.M.*, 64 FERC at 62,669 (finding that the jurisdictional border-crossing facilities do not support a finding that an environmental analysis of the nonjurisdictional assets is warranted).

<sup>51</sup> Application, Resource Report 1.10.1.

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at P 34 (finding that because the federal control over the intrastate pipeline is limited to “obtain[ing] any stream-crossing permits from the U.S. Army Corps of Engineers and consult[ing] with the U.S. Fish and Wildlife Service for compliance with the Endangered Species Act,” such “minimal federal control, however, is not enough to warrant federalizing the much larger non-jurisdictional facilities”); *San Diego Gas*, 64 FERC at 62,652.

under NEPA,”<sup>54</sup> the Commission should limit the scope of its NEPA review to the Border Facilities and reject Sierra Club’s argument that the Commission must analyze the environmental impacts of the Intrastate Facilities.

**D. The Border Facilities Are Consistent with the Public Interest, and There Is No Need for an Evidentiary Hearing.**

Public Citizen contends that Commission approval of the Border Facilities would not be in the public interest because the export of natural gas is detrimental to domestic energy markets.<sup>55</sup> However, the impact of any export on domestic markets is outside the scope of this proceeding. As the Commission has recognized, the Secretary of Energy “has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity of natural gas as part of the Commission’s public interest determination under NGA section 3(a). Thus, the claims by commenters discounting the value or need for gas exports are beyond the Commission’s purview and are not appropriately addressed here.”<sup>56</sup> In short, “[t]he Commission’s delegated responsibility under section 3 of the NGA over import/export facilities includes only the siting, construction, and operations of the facilities at the site of exportation”<sup>57</sup> and does not extend to transportation or import/export of natural gas.<sup>58</sup>

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<sup>54</sup> *San Diego Gas*, 64 FERC at 62,652.

<sup>55</sup> *See* Public Citizen Protest at 5.

<sup>56</sup> *Valley Crossing Pipeline, LLC*, 161 FERC ¶ 61,084, at P 12 (2017) (footnote omitted); *cf. Comanche Trail Pipeline, LLC*, 155 FERC ¶ 61,182, at P 14 (“[T]he claims by commenters that the capacity of this project, along with the capacity of the Trans-Pecos and Roadrunner projects, exceeds the Comisión Federal de Electricidad’s demand are beyond the Commission’s purview.”).

<sup>57</sup> *Western Gas Interstate Co.*, 59 FERC ¶ 61,022, at 61,048.

<sup>58</sup> *See* Pub. Law. 95-91, section 402(f); Secretary of Energy Delegation Order No. S1-DEL-FERC-2006, section 1.21(A).



Moreover, NGA section 3 requires “the Commission’s approval of an application under that section ‘unless . . . it finds that the proposed exportation and importation will not be consistent with the public interest.’”<sup>59</sup> In other words, section 3 “requires an affirmative showing of inconsistency with the public interest to *deny* an application,” which is in contrast to NGA section 7 which “requires an affirmative showing of public convenience and necessity to *grant* one.”<sup>60</sup> Section 3 further provides that “the exportation of natural gas to a nation with which there is in effect a free trade agreement . . . shall be deemed to be consistent with the public interest, and applications for such . . . exportation shall be granted without modification or delay.”<sup>61</sup> The United States and Mexico are parties to a free trade agreement, the United States-Mexico-Canada Agreement. Consequently, the clear text of the statute presumes the Project is in the public interest.

While the Saguaro system is primarily designed to support an LNG export facility that is under development on the West Coast of Mexico, that does not mean that all the gas is destined for overseas markets.<sup>62</sup> Saguaro does not intend to transport any of its own natural gas, and its shippers are responsible for sourcing the natural gas, obtaining any necessary export authorization, and for finding markets for such gas. The Department of Energy is responsible for evaluating the public interest based on the ultimate destination of

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<sup>59</sup> *Trans-Pecos Pipeline*, 155 FERC ¶ 61,140, at P 12 (quoting 15 U.S.C. § 717b(a)).

<sup>60</sup> *Panhandle Producers & Royalty Owners Ass'n v. ERA*, 822 F.2d 1105, 1111 (D.C. Cir. 1987) (citations omitted).

<sup>61</sup> 15 U.S.C. § 717b(c).

<sup>62</sup> The downstream pipeline in Mexico could deliver to points other than the LNG facility, and, in any event, natural gas will be delivered to compressor stations on the pipeline in Mexico, and perhaps to the LNG facility, for consumption as fuel in Mexico.

any exported gas.<sup>63</sup> Here, the Department of Energy has authorized Mexico Pacific Limited, LLC, the developer of the above LNG facility, to export to Mexico and from Mexico in the form of LNG to other nations based on a finding of public interest.<sup>64</sup>

Finally, the Commission should also reject Public Citizen's request for an evidentiary hearing.<sup>65</sup> The Commission has discretion to determine when a trial-type evidentiary hearing is required. The Commission may set a matter for evidentiary hearing when there are disputed issues of material fact that it cannot resolve on the written record.<sup>66</sup> The Commission is only required to convene a trial-type hearing where disputes arise that may involve issues of witness credibility and similar concerns.<sup>67</sup> In addition, a party requesting a trial-type hearing must proffer evidence adequate to demonstrate that a hearing is necessary.<sup>68</sup> Contrary to these well-established principles, Public Citizen has not

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<sup>63</sup> See, e.g., *Energia Costa Azul*, FE Docket No. 18-145-LNG (2019).

<sup>64</sup> See *Mexico Pacific Limited LLC*, DOE/FE Order No. 4248, Docket No. 18-70-LNG (Sept. 19, 2018); *Mexico Pacific Limited LLC*, DOE/FE Order No. 4312, Docket No. 18-70-LNG (Dec. 14, 2018).

<sup>65</sup> Public Citizen Protest at 1, 5.

<sup>66</sup> See *Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C. Cir. 2010) (Commission's choice to hold an evidentiary hearing is discretionary); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (the Commission does not need to conduct a hearing if it can resolve issues on the written record); *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006, at P 14 (2023) ("When the written record provides a sufficient basis for resolving the relevant issues, it is our practice to provide for a paper hearing.") (footnote omitted).

<sup>67</sup> See *Pac. Gas and Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (The Commission "may properly deny an evidentiary hearing if the issues, even disputed issues, may be adequately resolved on the written record, at least where there is no issue of motive, intent, or credibility.") (citation omitted); *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997) (same); *Iroquois Gas Transmission Sys., L.P.*, 52 FERC ¶ 61,091, at 61,368 (1990) (same).

<sup>68</sup> See *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990); *Pepco Holdings, Inc.*, 124 FERC ¶ 61,176, at P 130 (2008).

identified any legitimate challenges to the credibility of the evidence Saguaro has provided; rather, Public Citizen presents only policy issues that are beyond the scope of the Commission's delegated NGA section 3 authority.

#### **IV. CONCLUSION**

For the reasons stated above, Saguaro requests that the Commission: (1) accept this Answer with the clarifications and information provided herein; (2) conclude that its NGA siting jurisdiction applies only to the Border Facilities, not to the Intrastate Facilities; (3) determine that the scope of the NEPA review for this proceeding covers only the Border Facilities; (4) find that construction and operation of the Border Facilities is in the public interest; and (5) grant Saguaro's request for authorization under NGA section 3 and a Presidential Permit for the Border Facilities.

Respectfully submitted,

/s/ Ryan J. Collins

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February 24, 2023

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 24th day of February, 2023.

/s/ *Krystal A. Tapper*

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